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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1989

ANGELO GIANONE,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Petitioner, ANGELO GIANONE, prays that a Writ of Certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California for

the County of Los Angeles affirming the judgment of the Municipal Court of Pasadena Judicial District convicting petitioner of violation of California Penal Code Section 311.6 (presentation of obscene dance) for which he was ordered to serve six months in jail.

PROCEEDINGS BELOW

No written or oral opinions have been rendered in this matter. The judgment of conviction was made upon a jury verdict by Judge Warren L. Ettinger of the Municipal Court of Pasadena Judicial District, County of Los Angeles, State of California, on September 22, 1971, without opinion, and was affirmed by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles on February 15, 1972, again without opinion. Appendix A. On March 6, 1972, the same Appellate Department denied petitioner's requests for a rehearing, for a written opinion, and for certification to the Court of Appeal of the State of California, Second District, but did stay the issuance of its remittitur for thirty days to permit further review of its decision. Appendix B.

The proceedings below are reflected primarily in the Reporter's Transcript.

JURISDICTION

The date of the judgment sought to be reviewed is February 15, 1972. This Court has jurisdiction under 28 U.S.C. Section 1257(3). The Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles is the highest State Court to which a misdemeanor appeal can be taken. California Constitution, Article IV, Section 1. Further appellate review in California courts could only have been had by certification by the Appellate Department to the Court of Appeal, which was denied in the instant case. Rules 63 and 107 of California Rules of Court. This Court has reviewed obscenity convictions from the Appellate Department in the past. See Alberts v. California, 354 U.S. 476 (1957).

QUESTIONS PRESENTED

1. Is dancing performed before an audience as entertainment protected by the First Amendment?

2. Was the dance performed by the dancer at petitioner's place of business obscene?

3. Is dancing entitled to the same treatment as printed matter with respect to obscenity determinations?

4. May a dance be determined to be obscene without consideration of the entire dance as a whole?

5. May an owner of a restaurant-bar wherein dancing is presented as a form of entertainment be made absolutely criminally liable for dancing determined to be obscene?

6. Do this Court's obscenity tests apply to live dancing on a stage performed before an audience?

7. May petitioner be found guilty of presenting obscene live conduct without any evidence that he instructed or advised the dancer as to her manner of dancing, and without any evidence that he knew she would dance in a particular way?

8. Must this Court review every state obscenity conviction in order to determine whether First Amendment rights have been violated?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment (and to the extent the rights protected by the First Amendment apply to the states, the Fourteenth Amendment), to the United States Constitution, and California Penal Code Sections 311(e), (f) and (g) and 311.6.

FIRST AMENDMENT:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

FOURTEENTH AMENDMENT:

"Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws. . . ."

CALIFORNIA PENAL CODE, Section 311:

"As used in this chapter:

". . . .

"(e) 'Knowingly' means being aware of the character of the matter or live conduct.

"(f) 'Exhibit' means to show.

"(g) 'Obscene live conduct' means any physical human body activity whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomining, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

"(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

"(2) In prosecutions under this Chapter, where circumstances of production, presentation advertising,

or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance."

CALIFORNIA PENAL CODE, Section 311.6:

"Every person who knowingly engages or participates in, manages, produces, sponsors, presents or exhibits obscene live conduct to or before an assembly or audience consisting of at least one person or spectator in any public place or in any place exposed to public view, or in any place open to the public or to a segment thereof, whether or not an admission fee is charged, or whether or not attendance is conditioned upon the presentation of a membership card or other token, is guilty of a misdemeanor."

STATEMENT OF THE CASE

The Performance

Petitioner (defendant below) has been sentenced to serve six months in jail for violating California Penal Code Section 311.6 (a dancer allegedly "danced obscenely" at his premises).

Petitioner was charged with violating Penal Code Section 311.6 on April 7, 1971 in Pasadena, California. It was alleged that he "did wilfully and unlawfully and knowingly manage, produce, sponsor, present and exhibit obscene live conduct" to an audience (Reporter's Transcript, p. 4, hereinafter RT).

Petitioner owned and managed a restaurant-bar in Pasadena for eleven years, and possessed an entertainment permit and business license which allowed the presentation of nude dancing as a form of entertainment (RT 194-195).

Petitioner hired a dancer, Makedonka Spase Rollins, from the Dell Ray Agency, an independent agency that provides dancing girls to various places of entertainment (RT 204-205). Petitioner had posted dance instructions in the dressing room at the premises. The instructions required the dancers to dance a minimum of two feet from the customers sitting near the stage. The

instructions prohibited contact with the customers, and further prohibited lewd or obscene dancing (RT 184-185, 198).

Petitioner had never seen Rollins prior to her dancing at his premises on April 7, 1971 (RT 203).

Pasadena Police Officer Larry Harnois visited the petitioner's business (Gianone's Steak House) at about 10:15 P. M. on April 7, 1971, and upon entering, notice Rollins dancing on the stage wearing a negligee. He testified she "was dancing in front of a patron . . . . She was gyrating her hips from side to side, and she was putting her feet on the service bar" (RT 42-48).

He testified that she leaned over backwards and placed her hands on the stage, and her pubic hair was four to six inches from the patron's face, while her knees were separated approximately 24 to 26 inches and her hips were gyrating to the music. Harnois said he could see her vulva and anus (RT 50).

As she stood up, Harnois sat down next to the customer. She proceeded to place her heels on the serving area of the bar, separate her legs approximately 24-26 inches wide at the ankles, lean forward from her waist, and expose her vulva and anus to the customer and to Harnois (RT 51).

The recorded music concluded, and so did the dance. During a short intermission

which followed, Rollins removed the black negligee she had been wearing and laid it at the corner of the stage (RT 51-52).

Rollins commenced a second dance when the next record began. She danced in the center of the stage for a few moments, and then, in response to the placing upon the bar of some paper money by a customer, danced over to him and repeated her first performance. However, Harnois did not know how close the customer's face came to her knees. Upon concluding the dance, she picked up the money and danced around the middle of the stage. Later, upon commencement of a third record, Rollins began dancing again (RT 52-53). Another customer placed some money on the bar, and she

> ". . . repeated the performance to him by placing her knees on each side of the gentleman's head, her body being parallel with the stage and placing her pubic area within the area of his face." (RT 53.)

Finally, a fourth record began, and after dancing a while, Rollins approached the area where a customer had placed a five dollar bill. She placed her feet upon the serving area and leaned down, placing her knees at the sides of the man's head. She gyrated her pubic area approximately four inches from his face (RT 53). She immediately removed her knees and raised one leg in the air (RT 53).

After regaining her feet, she placed her heels on the serving area and spread her legs 24 to 26 inches apart at the ankles, and bent forward, exposing her private parts. She remained in that position for 15 to 20 seconds, and was approximately 12 to 14 inches from the nearest customer (RT 53-54).

Afterward, she completed her dance and picked up the money. In Harnois' words, ". . . she concluded her set." (RT 54.)

The dancers at Gianone's Steak House perform seven dances in approximately twenty minutes, each one of which is performed in conjunction with recorded music of approximately three minutes duration (RT 188-189). Harnois saw four dances of two and one-half to three minutes duration (RT 64).

Harnois did not describe the manner in which Rollins danced. His description of her performance was limited to the "extra-curicular" activities mentioned above. For example, when not engaged in the specific acts mentioned above, Rollins, according to Harnois, "was dancing in the center of the stage. . . ." (RT 52). No attempt was made to describe the "dance" aspects of the performance. Harnois admitted that while Rollins was at the center of the stage she performed a definite dance routine, but nowhere was this dance routine described. He admitted that at no time did Rollins touch or contact any customers, nor did she portray any sexual acts (RT 62).

Los Angeles County Deputy Sheriff, an "expert" on obscenity, listened to Harnois' testimony, and based solely thereon, concluded that the "activity described" by Harnois was obscene.

Petitioner's Participation

Harnois testified that when he entered the premises he noticed Gianone standing at the service area mixing drinks (RT 47; 55, lines 17-23). At 10:30 P.M., according to Harnois, Gianone left the service area to sit in a booth (Gianone testified he was sitting at a booth with Dr. Fineman (RT 183)). Harnois' testimony, boiled down, indicates that while Rollins was performing, Gianone looked toward the stage on only two occasions (RT 56, line 14). The first time, Harnois noticed "Gianone looking towards the stage for a few moments. . . ." (RT 56, line 20). The second time Gianone glanced at the stage rapidly (RT 56, lines 23-25). Harnois admitted that he did not see Gianone looking at the stage when Harnois left the premises (RT 57).

The prosecutor's theory, repeatedly stated during argument to the jury, was that Rollins' conduct was lewd because of her proximity to the customers (RT 245, lines 22-28; RT 246, line 1) and because her conduct in approaching the customers was not a part of her dance routine (RT 252, lines 24-28; RT 253, line 1).

REASONS FOR GRANTING THE WRIT

A. The Judgment Below Violates Petitioner's Rights Under the First and Fourteenth Amendments.

1. The Dances Were Not Obscene As a Matter of Law.

Although this Court has never determined whether or not the First Amendment covers entertainment in the form of dancing, the California Supreme Court has so held, In re Giannini, 69 Cal. 2d 563 (1968); Barrows v. Municipal Court, 1 Cal. 3d 821 (1970), and the California legislature has responded by applying this Court's "obscenity tests" prescribed by Memoirs v. Massachusetts, 383 U.S. 413 (1966) and Roth v. United States, 354 U.S. 476 (1957). Petitioner submits that the First Amendment does indeed protect dancing, as the California Supreme Court has so held, and that it only loses that protection upon its becoming obscene. Petitioner also submits that the California Supreme Court in In re Giannini, supra, and the California legislature have correctly determined that the standards and rules set forth by this Court for detecting obscenity with regard to printed matter and films are applicable to live dancing.

Accordingly, it is incumbent upon this Court to make an independent review of the evidence to make sure that First Amendment rights have not been suppressed in the name of obscenity. This Court recognized such a responsibility in Jacobellis v. Ohio, 378 U.S. 184, 188 (1964):

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. . . . Such an issue, we think, must ultimately be decided by this Court. . . ."

Independent review by this Court must lead to a reversal of the conviction. As a matter of law the performances were not obscene for there was no graphic depiction of sexual activity. "Graphic depiction of sexual activity is the distinguishing feature of the only materials which the United States Supreme Court has ruled to be obscene." In re Panchot, 70 Cal. 2d 105, 107, n. 5 (1968).

The dances themselves were not even described in detail. Under no circumstances can they be deemed obscene. The prosecutor, instead, pointed out, and the evidence showed, that the dances themselves did not lead to the filing of the criminal charges, but rather certain conduct of the dancer done outside the scope of the dance. Even if the additional activity be deemed obscene (which petitioner

does not concede because of the absence of any sexual activity), the dances themselves were not. The conviction cannot stand if the dances themselves were not obscene, for that is all petitioner was accused of.

Moreover, even if the "extra activity" by the edge of the stage was the subject of the prosecution, the conviction cannot stand because the entire performances were not considered as a whole. It has long been established that the matter (or live conduct) must be considered as a whole in an obscenity prosecution. Memoirs v. Massachusetts, supra.

It should be noted that this case does not merely involve a dispute over standards of community tolerance, which may differ from state to state (but see Jacobellis v. Ohio, supra: nationwide v. state community standards), but rather the complete failure to comply with one of the "tests" prescribed by this Court in the field of obscenity, i.e., that the matter be considered as a whole.

2. There Was No Evidence of Scienter

In Smith v. California, 361 U.S. 147 (1959), this Court held that a person could not constitutionally be convicted of selling an obscene book without proof of scienter. Otherwise, a person would be made absolutely liable for any obscene book sold on the premises,

which would result in a drastic reduction in the number of books sold, for the bookseller would be forced to read and review every book sold in order to screen suspect books.

In the instant case petitioner has been made absolutely criminally liable for the conduct of a dancer whom he never saw prior to her performance. Petitioner did not instruct or advise Rollins how to dance. A conviction might be justified if there were some evidence that petitioner told Rollins how to dance or in other ways advised or instructed her. Rollins was not even petitioner's employee. She was a private contractor or an employee of one who merely came to petitioner's business establishment to perform a dance protected by the First Amendment to the United States Constitution.

The situation is no different than a publisher sending a book to a bookstore owner to sell at his store. Unless the bookstore owner has read or reviewed the book, or in other ways made known the contents of the book, he may not be prosecuted if the book turns out to be obscene. Smith v. California, supra.

It is no answer to say that the requisite knowledge or scienter was supplied when petitioner, on the premises, glanced at the stage. Scienter cannot be established contemporaneously with the performance. Establishment of scienter contemporaneously with the performance is a legal and constitutional

impossibility. If such were the rule, the instant a performance becomes obscene the owner becomes a criminal.

Petitioner respectfully submits that at a minimum Rollins or he should have been told by the vice officer (Harnois) that the performance was becoming obscene or approaching obscenity. This would have put them on notice that continued performances would be at their peril. This Court has recently again re-emphasized the importance of notice. Rabe v. Washington, ___ U.S. ___ (71-2427, March 20, 1972).

3. There Was No Evidence of Guilt

Petitioner realizes that this Court does not prefer to reweigh or examine the sufficiency of evidence in criminal matters. However, this Court has done so on occasions where there is absolutely no evidence of guilt. "[I]t is a violation of due process to convict and punish a man without evidence of his guilt." Thompson v. Louisville, 362 U.S. 199 (1960).

In the instant case there is absolutely no evidence that petitioner knowingly presented an obscene performance. Dancer Rollins was not a puppet whose strings were being pulled by petitioner. She was an independent dancer who was performing for the first time

at petitioner's business (Gianone's Steak House). Petitioner cannot, under our Constitution, be made absolutely criminally liable for the conduct of dancer Rollins. A dancer is not like a book, the pages of which remain constant. No two performances are alike. Petitioner cannot be made responsible for Rollins' conduct in the absence of any evidence that he told her how to dance, or that he knew prior to her performances how she was going to dance.

That the Respondent's position is that all bar or restaurant owners are absolutely liable for the conduct of dancers performing at their premises is evidenced by the fact that criminal complaints are filed against such persons irrespective of their presence at the "scene of the crime" or their advice or instruction, or lack thereof, provided the performers.

B. The Judgment Below Raises an Important Constitutional Issue Which Should Be Determined By This Court

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This Court has never ruled on the scope of the First Amendment as it pertains to the performance of a dance. This case presents an appropriate vehicle for determining whether the protection of the First Amendment should extend to the performance of a dance. Of course, the California Supreme Court has so held,

In re Giannini, supra, and petitioner urges this Court to come to the same conclusion. The matter is of growing interest in view of the number of business establishments offering nude dancing as a form of entertainment. This Court has recently expressed interest in a related case from California, California v. La Rue, prob. juris. noted, ___ U.S. ___ (1972).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROGER JON DIAMOND

Attorney for Petitioner

APPENDIX A

Appellate Department
Superior Court, Los Angeles County, California

No. CR A 10827

PEOPLE vs. GIANONE

Appellant's oral motion in the above entitled appeal to strike Appellant's brief is denied. Judgment affirmed. Judgment filed.

Date Feb. 15, 1972

William G. Sharp, County Clerk
and Clerk of the Superior Court
of California, County of
Los Angeles

By T. Lockard Deputy

APPENDIX B

Appellate Department
Superior Court, Los Angeles County, California

No. CR A 10827

Petition in the above-entitled appeal for rehearing/certification for written opinion denied. Request to stay remittitur 30 days is granted. Order filed.

Date March 6, 1972

William G. Sharp, County Clerk and
Clerk of the Superior Court of
California, County of Los Angeles

By T. Lockard Deputy